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### Review of Labor and the Legal Process, by H. H. Wellington

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## BOOKS

**LABOR AND THE LEGAL PROCESS.** By Harry H. Wellington. New Haven and London: Yale University Press, 1968. Pp. xi, 409. \$10.00.

If there is a more acute intellect than that of Harry Wellington at work today in labor law, I am unaware of it. This makes his new book all the more troubling, for it reveals the limitations, or perhaps I should even say the deficiencies, of a highly rational approach to the regulation of industrial relations. Professor Wellington has two stated objectives (he disclaims any attempt at a comprehensive text on labor law). First, he wishes to appraise "the role of the legal process in moving collective bargaining to its present position at the center of national labor policy." Second, he wants to examine in detail "a variety of problems created for government by collective bargaining."<sup>1</sup> It is in the pursuit of his first goal, especially, that Professor Wellington seems handicapped by his penchant for a priori reasoning.

Professor Wellington has a deep reverence for "the integrity of the judicial process."<sup>2</sup> He feels that the courts, beginning with the early conspiracy trials and continuing through the decisions making collective agreements enforceable as a matter of federal law, have repeatedly exceeded their institutional capabilities by attempting to resolve disputes in the absence of "reasonably knowable, preexisting standards."<sup>3</sup> In his opinion, the formulation of basic policy toward collective bargaining requires political judgments that are properly within the province of the legislature, and even the relatively routine governance of labor relations may call for an ordering of societal values that will strain the courts' resources and reduce their overall effectiveness. I sympathize with the view that the courts, and the United States Supreme Court in particular, have often presumed to act on highly tenuous grounds. Any objective observer, for example, must have been left slightly breathless by the casual manner in which the *Lincoln Mills*<sup>4</sup> majority transformed a seemingly procedural provision like section 301 of the Taft-Hartley Act into a legislative mandate that the federal courts construct a whole new body of substantive law to govern labor contracts. On a policy basis, of course, there was much to commend the creation of a uniform body of doctrine to regulate labor agreements across the country. Regardless of that, however, I think a hard-headed appraisal of historical developments suggests that such judicial "usurpations" as *Lincoln Mills* do far more injury to democratic theory than to the vitality of the courts.

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1. P. 2.

2. P. 122.

3. Pp. 17, 99, 109, 124-25, 163.

4. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

Traditions as old as equity's first decrees of specific relief, and as new as the reapportionment cases support the courts in their move to fill the vacuums resulting from the inaction of other legal institutions. If the courts take a wrong direction, as they did in the early labor injunction cases, they will eventually be checked. But I see no evidence that they are more prone to error than the rest of society's lawgivers, or that their effectiveness is significantly impaired by an occasional misstep. Certainly some examples upon which Professor Wellington lays special stress, such as *Lincoln Mills* and its progeny, are not at all persuasive. Over a decade ago he and his Yale colleague, Alexander Bickel, contended that in *Lincoln Mills* the Supreme Court was demanding of the federal courts a task to which they are "enormously unequal," and "its imposition on them is therefore capable of damaging their usefulness for the essential duties that they are suited to perform."<sup>5</sup> Time has shown that conclusion to be wrong. The courts have laid down some broad (and hardly startling) guidelines on the interpretation of labor agreements, and prudently have left their day-to-day application to the arbitrators. I suspect the exercise of the ancient diversity jurisdiction, encumbered as it is with today's heavy load of motor vehicle cases, has proved a far greater threat to the institutional capacities of the federal courts.

Professor Wellington is still unhappy about having the federal courts enforce labor agreements, but in the present volume he shifts the ground of his attack. He argues that judicial enforcement of collective agreements has been overly concerned with "effectuating the statute's goal of industrial peace—a job at which the courts must be unsuccessful," and not enough concerned with "preserving its ideal of freedom of contract."<sup>6</sup> He then poses a dilemma. If the courts continue to rubber stamp arbitrators' decisions as a method of contract enforcement, they will abdicate their proper responsibility. But if they engage in serious judicial review, they will inevitably tend to inhibit arbitrators and reduce the healthy exercise of discretion. To escape this dilemma and ensure a desirable measure of flexibility in contract administration, the author proposes the radical surgery of eliminating judicial enforcement of labor agreements.

I find this analysis faulty at several points, and in ways characteristic of much of the rest of the book. First, the author speculates that court intervention will not promote industrial peace because a union (or employer) so aroused that it is prepared to engage in a strike (or other economic combat) over a particular issue will not be deterred by any legal rule. That is armchair reasoning. Experience under both the national emergency procedures of Taft-Hartley and the "mandatory" injunction provision of the National

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5. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 22-23 (1957).

6. P. 122.

Labor Relations Act establishes that most unions will bow to court orders against striking, however distasteful compliance may be. (There is a considerable difference between the attitude of unions toward a legislative command not to strike, phrased in general statutory terms, and their attitude toward a judicial decree, issued after a full hearing on the facts and tailored to a particular situation. I wish Professor Wellington, in discussing the respective roles of the courts and the legislatures, had given some attention to this point.)

Second, the author too hastily concludes that the Supreme Court has required the lower courts to approve arbitral awards "blindly," and he assails this straw man on the ground that "contempt of court and ultimate imprisonment may be at stake."<sup>7</sup> I have heard of no contempt citations following a judge's "blind" endorsement of an arbitrator's decision. Moreover, empirical studies disclose that our present system of court-enforced arbitration meets with the general approval of both employers and unions.<sup>8</sup> Lastly, and even more important, the proposal to remove the judiciary altogether from the area of union contract enforcement comes so late in the day that it smacks of the quixotic. The Wagner Act's protection of organizational rights probably made comprehensive federal regulation of nearly all phases of labor relations, including contract administration, inevitable. But in any event *Lincoln Mills* is a battle that has been fought and lost, and there seems little profit in raking up the ruins a dozen years later. At some point a critic's "ought" must yield to a well-established and not-intolerable "is."

Although Professor Wellington constantly calls for the judiciary to exercise restraint in dealing with industrial relations, he sees the National Labor Relations Board in a wholly different posture. In urging the Board, but not the courts, to press forward to develop standards of fair representation to safeguard individuals in collective bargaining, he says:

Judges are generalists. When their reasonable man comes from a specialized community they may be in trouble . . . The Labor Board member, however, is a specialist, or soon becomes one after appointment . . . He has all of the aids necessary—a specialized bar, the use of expert testimony, official notice, a learned staff, and continuing exposure to the problem.<sup>9</sup>

Labor Board members are generally able and dedicated men, but the contrast depicted here between them and judges is fair to neither group. The value of "administrative expertise" can easily be inflated to mythic proportions. Unquestionably, agency specialization improves efficiency in the handling of routine cases, and it also may enable a better planned and co-

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7. Pp. 122-23.

8. See, e.g., Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1116-19 (1964).

9. P. 166.

ordinated attack on a given problem. But beyond that I am skeptical about any assertion that there is inherent superiority of administrative over judicial decision-making. Agency members and their staffs in Washington are almost as isolated from the grass roots of the industry regulated as appellate judges. And to the extent they do become "specialists" rather than "generalists," they probably lose in breadth what they gain in depth. At any rate, I would not hesitate to match the record of the courts over the years against that of the Labor Board in dealing even with such technical questions as the secondary boycott, the allowable use of economic weapons in a labor dispute, and the right of unions and employers to communicate with workers. When one moves on to a more generalized, value-laden issue, like an employee's right to be represented fairly in collective bargaining, I should think the judiciary's wide experience with other confrontations between individual and group interests would, if anything, be a positive advantage.

For me, then, Professor Wellington's study is flawed by its exaggerated emphasis on the need for judicial restraint in the development of sound labor policy. I say this even though I find myself in frequent agreement with him that the courts have intruded improperly; but my rationale has to be a matter of political theory, or perhaps even my own notions of intellectual honesty, not practical results. I do not think Professor Wellington has succeeded in demonstrating that the courts' intervention in recent times has been injurious either to industrial relations or to themselves.

In addition to developing his underlying thesis regarding the role of law in the emergence of collective bargaining, Professor Wellington deals at length with five specific related problems. In his opinion, two of these, the major strike and the terms of contract settlements, "threaten the survival of existing labor-management institutions."<sup>10</sup> The other three are important but not critical. They include management prerogatives and union participation in collective bargaining, the individual employee in the collective structure, and unions in the political process. I would largely agree with his evaluation on four counts, but I have reservations about the validity of his assessment of bargaining settlements as a potential lethal element in the existing system.

Professor Wellington asserts that in all of the industrialized nations of the West, the "allegedly inflationary effects" of collective settlements have become an "obsession."<sup>11</sup> He warns that unless this problem is effectively resolved, public reaction could jeopardize such valuable existing institutions as the labor union itself. His proposals include (1) a modification of the legal duty to bargain to compel parties to discuss the application to a particular firm of the flexible 1962 wage-price guideposts of the Council of Economic Advisers, and (2) the creation of a federal commission to intervene in selected

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10. P. 2.

11. P. 299.

negotiations of major importance and express the position of the government. I think Professor Wellington's prescription merits careful consideration, but I also think he magnifies the gravity of the disease. As he himself recognizes in his discussion of the contrasting theories of "demand-pull" and "cost-push" inflation, economists are deeply divided over whether unions do contribute to inflationary pressures by pushing wage levels to unjustified heights. Some exponents of the more widely accepted demand-pull theory actually look to union "monopoly power" for aid in *stopping* inflation.<sup>12</sup> I doubt whether many persons capable of following these convoluted economic debates would be prepared to imperil established institutions like labor organizations on the basis of the shaky evidence now available. As for the general public, Professor Wellington does not convince me that it is unduly aroused over inflation. The closest he comes to citing the views of the man in the street, or even the politician in the street, is a quote from the *New York Times*. My own hunch is that the public is far more exercised by what precedes a settlement—the disruptive strike—than by the settlement itself.

My final complaint should place the preceding criticisms in better perspective. I am disappointed the author did not treat more fully several hotly debated current issues related to collective bargaining. These include the use of employer and union economic weapons, like the lockout and the boycott, and the proper role of the NLRB in defining their legitimacy; the application of antitrust doctrines to labor negotiations; the gradual expansion of Board jurisdiction to encompass the enforcement of union contracts in certain circumstances; and the fashioning of more effective administrative remedies for unlawful refusals to bargain. For I find, however much I may disagree with Professor Wellington on any point, what he has to say is always thoughtful, trenchant, and stimulating. And when he is in his element—by which I mean the realm of legal and political theory—when, for example, he is analyzing the concept of "state action" in *Machinists v. Street*,<sup>13</sup> and is attempting to work out an intellectually defensible method of protecting dissenting employees against being forced to support union political activities—then one simply bows to the performance of a master craftsman.

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12. Pp. 303-05.

13. 367 U.S. 740 (1961).